Koperasi Pasaraya (M) Bhd v UDA Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–21–153 OF 1997
AZMEL J
21 SEPTEMBER 2006

Public Authorities — Tort — Nuisance — Closure of road caused plaintiff's business to collapse — Whether plaintiff entitled to damages

Tort — Nuisance — Closure of public road — Closure of road by public authorities caused plaintiff's business to collapse — Whether plaintiff entitled to damages

At the commencement of this action in 1997, the plaintiff was running a supermarket business at the ground floor of a 19-storey building at Jalan Haji Hussein, Kuala Lumpur. The main entrance to the supermarket was at Lorong Haji Hussein 3, where 35 car parking bays were located. Sometime towards the end of October 1996, the second defendant acting in concert with the first and the third defendants caused the Lorong Haji Hussein 3 to be closed to all traffic. The first defendant declared and categorised that part of Lorong Haji Hussein 3 adjacent to the plaintiff's supermarket as a temporary occupational licence ('TOL') after an application by the second defendant who also closed the road to all traffic. Subsequently, the first defendant constructed 76 stalls at Lorong Haji Hussein. The number of customers coming to the plaintiff's supermarket began to dwindle due to access problem by cars and difficulty of parking. The road was only reopen to public after a period of five years. Due to the road closure the plaintiff's supermarket business suffered tremendously. It therefore had to close its business. The plaintiff claimed for damages sustained.

Held, allowing the plaintiff's claim with costs:

(1) The three defendants had jointly acted unreasonably causing public nuisance especially to the plaintiff, an occupier along the affected public road. The defendants had failed to consider the hardship of a great number of the public road users and occupiers along the public road in favour of a few unlawful traders. The direct consequence of their intended act had caused great loss to the plaintiff in its supermarket business. As statutory authorities and government department, they were duty bound to enquire as to how the business of the affected people including the plaintiff would be affected by the closure of the road. Thus, the TOL had been unlawfully issued, the road had been unlawfully closed and the 76 stalls had been invalidly constructed. The defendants had created nuisance to the public including the plaintiff as an occupier of the road (see para 18).

(2) The closure of Lorong Haji Hussein 3 was the sole cause of the collapse of the plaintiff's supermarket business. Whilst it was true that there were other places for the plaintiff's customers to park their cars, these lots were no longer at par as what the customers had been previously used to enjoy especially the ability to load and unload goods and passengers at the entrance (see para 23).

(3) The defence did not call any witness, let alone expert witness, to rebut the quantum of damages suffered by the plaintiff. The court therefore allowed the plaintiff's claims for losses amounting to RM23,743,157 with interest at the rate of 8% per annum as the claims were reasonable and justified (see para 28).

[Bahasa Malaysia summary

Ketika bermulanya tindakan ini pada 1997, plaintif menjalankan perniagaan pasaraya di tingkat bawah bangunan 19 tingkat di Jalan Haji Hussien, Kuala Lumpur. Pintu masuk utama ke pasaraya adalah di Lorong Haji Hussein 3 di mana terletaknya 35 ruang tempat meletak kereta. Di penghujung bulan Oktober 1996, defendan kedua bertindak bersama-sama dengan defendan pertama dan ketiga menyebabkan Lorong Haji Hussien 3 ditutup kepada kesemua lalu lintas. Defendan pertama mengisytihar dan mengkategorikan sebahagian Lorong Haji Hussien 3 yang bersebelahan dengan pasaraya plaintif sebagai lesen penghunian sementara ('LPS') selepas permohonan daripada defendan kedua yang mana juga menutup jalan kepada semua lalu lintas. Seterusnya, defendan pertama telah membina 76 gerai di Lorong Haji Hussein. Bilangan pelanggan yang datang ke pasaraya plaintif mula berkurangan disebabkan oleh masalah jalan masuk kereta dan kesukaran meletak kereta. Jalan tersebut hanya dibuka semula kepada awam selepas lima tahun. Disebabkan penutupan jalan tersebut, perniagaan pasaraya plaintif terjejas teruk. Oleh yang demikian, perniagaannya terpaksa ditutup. Plaintif menuntut atas kerugian yang dialami.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Ketiga-tiga defendan telah bersama-sama bertindak tidak wajar menyebabkan kacau ganggu awam terutama kepada plaintif, penghuni sepanjang jalan awam yang terjejas. Defendan-defendan telah gagal untuk mengambil kira kesusahan kepada orang ramai pengguna jalan awam dan penghuni sepanjang jalan awam yang memihak kepada beberapa peniaga yang menyalahi undang-undang. Akibat langsung daripada tindakan yang dirancang telah menyebabkan kerugian besar plaintif di dalam perniagaan pasarayanya. Sebagai pihak berkuasa berkanun dan jabatan kerajaan mereka bertanggungjawab untuk menyiasat berkenaan dengan bagaimana perniagaan mereka yang terlibat termasuk plaintif yang mungkin terjejas dengan penutupan jalan tersebut. Oleh yang demikian, pemberian LPS adalah menyalahi undang-undang, jalan yang ditutup menyalahi undang-undang dan 76 gerai telah dibina secara tidak sah. Defendan-defendan telah menimbulkan kacau ganggu kepada awam termasuk plaintif sebagai penghuni jalan tersebut (lihat perenggan 18).

(2) Penutupan Lorong Haji Hussien 3 adalah satu-satunya sebab kejatuhan perniagaan pasaraya plaintif. Sementara itu, adalah benar bahawa terdapatnya

tempat lain untuk pelanggan plaintif meletakkan kereta mereka, lot-lot tersebut tidak lagi setara sebagaimana pelanggan-pelanggan menggunakan untuk menikmati sebelumnya terutama keupayaan untuk menaik dan menurunkan barang dan penumpang di pintu masuk (lihat perenggan 23).

(3) Pembelaan tidak memanggil mana-mana saksi, membiarkan seorang saksi pakar untuk mematahkan kuantum ganti rugi yang ditanggung oleh plaintif. Mahkamah dengan ini membenarkan tuntutan plaintif untuk kerugian yang berjumlah RM23,743,157 dengan faedah pada kadar 8% setahun memandangkan tuntutan adalah munasabah dan adil (lihat perenggan 28).]

Notes

For cases on nuisance generally, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1327–1364.

For cases on tort generally, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1687–1708.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Core [1948] 1 KB 223 (refd)

Majlis Perbandaran Ampang Jaya v Stephen Phoe [2006] 2 MLJ 389 (refd)

Nasiliou v Secretary of State for Transport & Anor [1991] 2 All ER 135 (refd)

Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara Selatan [1997] 5 MLJ 488 (refd)

Sykt Perniagaan United Aces Sdn Bhd & Ors v Majlis Perbandaran Petaling Jaya [1997] 1 MLJ 394 (refd)

Legislation referred to

Government Proceedings Act 1956 s 8

Local Government Act 1976

[*Editorial Note:* The plaintiff had appealed against the High Court decision reported in [2002] 7 MLJ 174, which was reversed by the Court of Appeal vide Civil Appeal Nos W–01–15 of 2000 and W–01–49 of 2001.]

A Kanesalingam (V Jayakumar with him) (Kanesalingam & Co) for the plaintiff.

Hj Zulkifli Noordin (Zulkifli Noordin & Associates) for the first defendant.

Ramesh Abraham (Shamsul Bahrin and Claire Gan and Lim Jo Van with him) (Shook Lin & Bok) for the second defendant.

S Narkunavathy (Senior Federal Counsel, Attorney General's Chambers) for the third defendant.

Azmel J (now FCJ):

BACKGROUND

[1] At the commencement of this action in 1997, the plaintiff was running a supermarket business at the ground floor of a 19-storey building at No 69, Jalan Haji Hussein, Kuala Lumpur. The plaintiff had started its business at this premise

A sometime in 1975. The plaintiff being a cooperative society, enjoyed getting customers mainly from its members consisting of about 6000 individual members and 50 cooperative societies, eg Police Cooperative Society, the Armed Forces Cooperative Society and Wilayah Persekutuan Government Servants Cooperative Society. The products sold at the supermarket were mainly food stuff and essential household goods. The main entrance to the supermarket was at Lorong Haji Hussein B 3 where 35 car parking bays were located. This side road is a thoroughfare and proved to be very convenient to the customers of the plaintiff's supermarket for purposes of loading and unloading passengers and goods to their vehicles.

C **[2]** The supermarket was open daily between 8am and 10pm. It closed only on Hah Raya Puasa for two days and another two days in a year for stock taking. On the average, the plaintiff had about 3,500 customers to purchase goods daily. For each of the years 1994, 1995 and 1996, the supermarket sold more than RM21,000,000 worth of goods. In the three preceding years it sold more than RM20,000,000 worth of goods yearly. Hence, the average annual profit for the six year period was worked D out to be RM382,288.

[3] Based on the nature of goods sold and the type of customers patronizing the supermarket, its business was not affected by recession or competition by the emergence of wholesale markets and hypermarkets prior to 1996. During the 1985 E recession the plaintiff's supermarket business was not at all affected whereas most other businesses had suffered badly. The emergence of supermarkets well before 1994, as noted in the plaintiff's annual reports, had not caused any adverse effect on the sales of the plaintiff's supermarket. The plaintiff's customers continued to patronize the supermarket to purchase their daily household needs.

F CLOSURE OF LORONG HAJI HUSSEIN 3

[4] Sometime towards the end of October 1996, the second defendant acting in concert with the first and the third defendants caused the Lorong Haji Hussein 3 to be closed to all traffic. It began with the first defendant declaring and categorising G that part of Lorong Haji Hussein 3 adjacent to the plaintiff's supermarket as a temporary occupational licence (TOL) after an application by the second defendant who also dosed the road to all traffic. Subsequently the first defendant constructed 76 stalls at Lorong Haji Hussein 3.

H **[5]** The purpose of the actions taken by the three defendants was as follows. The first defendant, who at the relevant time known as Urban Development Authority (UDA), a statutory body, intended to construct two multi-storey building on Lot 2347, situated not far from the plaintiff's supermarket on the same Jalan Haji Hussein. It so happened that during that time UDA's land was occupied by I unlicensed hawkers. To commence development on the said land UDA had to remove the unlicensed hawkers first. To do that UDA sought the assistance of Dewan Bandaraya Kuala Lumpur (DBKL), the second defendant in this suit, to have the said hawkers removed from UDA's land. However it was also necessary for the second defendant to locate a new place for the said hawkers. It was decided that the place would be Lorong Haji Hussein 3 that part of public road adjacent to the entrance to

the plaintiff's supermarket. To do that the approval of the Land Administrator for Wilayah Persekutuan Kuala Lumpur, the third defendant, to have the Lorong Haji Hussein 3 converted from a public road to a TOL had to be obtained. An application to that effect was made by both the first and second defendants. The third defendant granted the application. Once that part of Lorong Haji Hussein 3 was converted into a TOL the second defendant closed the road to all traffic and the first defendant constructed 76 stalls with a view to relocate the said hawkers here from UDA's land. Although keys to 36 stalls had been collected it would appear that only 12 stalls were occupied by the said hawkers. Be that as it may, its effect on the plaintiff's supermarket business had been very adverse. The number of customers coming to the plaintiff's supermarket began to dwindle. The main reason was due to access problem by cars and difficulty of parking. The road had been barricaded by the second defendant. The car parking bays had been abolished. That area had been congested with so many people a completely different situation as that before it was closed.

[6] The closure of the road was supposedly for a period of two years. But it turned out that it was only reopen to public after a period of five years. It was closed from 28 October 1996 to 30 November 2001. Due to the road closure the plaintiff's supermarket business suffered tremendously. It had to resort to the selling of the building and renting it back from the purchaser in the hope that it would be able to sustain the losses within the period of two years during the road closure. But the plaintiff was unable to sustain the loss any further as the road closure had continued well beyond the two year period. It therefore had to close its business.

THE PLAINTIFF'S ACTION

[7] When the plaintiff filed its action in 1997, just after the closure of the road, the plaintiff prayed for an order that the 76 stalls constructed on Lorong Haji Hussein 3 be demolished and road be reopen to public as it was before the closure.

[8] Unfortunately, this case had dragged on for a long period which result in a change of circumstances from the plaintiff's point of view. The statement of claim had therefore been amended several times. Amendments were made in 1998, 2000 and finally in 2004.

[9] In the course of the hearing, I made two preliminary orders. In the first ruling dated 12 February 2000, I said that the TOL made by the third defendant was valid. But the hearing nevertheless proceeded on. I decided that the hearing should proceed to determine the issue of liability first. The issue of quantum should be determined after liability is established. But the plaintiffs counsel insisted he be allowed to prove loss as the plaintiff's action is based on public nuisance under s 8 of the Government Proceedings Act 1956 which requires proof of pecuniary loss. That being the position I asked the plaintiff and the defendants to submit to me whether the plaintiff had complied with the requirements of s 8 of the said Act. In the end, I ruled that the plaintiff had failed to comply. I therefore ruled that the plaintiff's action was invalid and struck out the action. My ground of judgment in respect of both rulings was decided in [2002] 7 MLJ 174.

[10] The plaintiff appealed against both rulings to the Court of Appeal. On 26 July 2004, the Court of Appeal heard both matters and decided to allow both the plaintiff's appeal with the consequence that both my rulings were reversed. The Court of Appeal also ordered me to proceed with the hearing of this case which I dutifully complied. Subsequent to the decision of the Court of Appeal, the plaintiff made its final amendment to its statement of claim. The plaintiff at this stage abandoned its prayer for demolition of the 76 stalls and restoration of the Lorong Haji Hussien 3 before its closure, due to the fact that the said road had been reopen to public and the 76 stalls had been demolished. The plaintiff now prayed for damages instead.

[11] As a High Court judge, I am bound by the decision of the Court of Appeal. I must stress that both my decisions in respect of the two preliminary issues were based purely on procedure. I did not touch on the substantive law aspect of it as at the time of the rulings, I was not apprised of the whole facts of the case yet. Now that I have before me the whole facts, I was quite convinced that the issuance of the TOL was invalid.

THE ISSUE ON THE VALIDITY OF THE TOL

[12] In the light of the change of circumstances of this case as reflected in the final amended statement of claim of the plaintiff which had abandoned its original prayer for demolition of the 76 stalls and restoration of Lorong Haji Hussein 3 to the situation before it was closed and confining its prayer only for damages, I am inclined to think that the validity of the TOL is a non-issue. I say this because as it stood at the subsequent hearing after the ruling made by the Court of Appeal, the 76 stalls had been demolished and the public road had been reopen. There was no more application for mandatory orders against the government and the statutory body, respectively. What was left was the claim for damages. Just like in a land acquisition case there were times when the acquisition was validly made but the claim for compensation, unless agreed by both parties, would have to proceed.

[13] Nevertheless I shall proceed to consider the validity of the TOL. As I have stated above I was inclined to think that the TOL was invalidly issued. I said this on the basis of the purpose for which it was issued and on what type of land. As regard the purpose of the issuance of the TOL on Lorong Haji Hussein 3 it was for the construction of 76 stalls to relocate the hawkers found on UDA's land at Lot 2347. There appeared to be a sort of dispute as to whose responsibility it was to remove the hawkers. UDA said it was the responsibility of DBKL but DBKL insisted that it was UDA. Nonetheless both of them agreed to jointly work together to have the said hawkers relocated at Lorong Haji Hussein 3. Two issues came to my mind straightaway. Firstly, the relocation of hawkers most of whom were unlicensed. And the other, the TOL was issued on a public road heavily used by public as well as occupants of buildings along the public road. Could the purpose of the TOL on a public road override the daily usage of the road by thousands of members of the public? I think not. I have not come across any case where any authority had ever issued TOL on any public road that is heavily used by the public for the benefit of a handful unlawful traders. To my knowledge TOL is issued on government land

where it is not occupied or unlawfully occupied by someone. While it is true that the authority has the power to issue TOL on any land it cannot do so without reasonable justification. There is no legitimate justification in this case. The action would be unreasonable if it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (see *Associated Provincial Picture Houses Ltd v Wednesbury Core* [1948] 1 KB 223).

[14] As if Lorong Haji Hussein 3 is the only place available in the whole territory of Kuala Lumpur to relocate the traders. This is a show of arrogance on the part of the three defendants especially the second defendant indicating to the public that they could do anything they like. By closing Lorong Haji Hussein 3, which is a thoroughfare, to all forms of traffic and congesting the main entrance to the plaintiff's supermarket, the three defendants had completely ignored the hardship caused the road users as well as the occupiers of the buildings along Lorong Haji Hussein 3 especially the plaintiff. Due to their action, the plaintiff's customers decided to choose other supermarkets to purchase their daily household needs. The actions of the three defendants had certainly caused great nuisance to the public including the plaintiff. In my view this is certainly a case of improper exercise of statutory power and therefore it could not be lawful.

[15] In the case of *Sykt Perniagaan United Aces Sdn Bhd & Ors v Majlis Perbandaran Petaling Jaya* [1997] 1 MLJ 394, it was held that even a temporary closure of a road or even part of it as in that case in order to turn it into a night market which in turn had resulted in obstruction health hazard and a situation clearly detrimental to the residents of premises along the road was ultra vires the Local Government Act 1976 and against the public right of road users.

[16] In *Parimala a/p Muthusamy & Ors v Projek Lebuhraya Utara Selatan* [1997] 5 MLJ 488, Suriyadi J said at p 501:

> There is sufficient authority to say that if a person's right of free passage or some rights connected therewith has been the subject of interference, he is endorsed with the right to take up a nuisance action.

[17] In *Nasiliou v Secretary of State for Transport & Anor* [1991] 2 All ER 135, the English Court of Appeal held:

> When deciding whether to make an order authorising the stopping up of a highway under s 209 of the 1971 Act, the Secretary of State was entitled to, and should, take into account the adverse effect his order would have on the trade of an owner of a business being carried on land sojourning the highway and the financial loss resulting as a direct consequence of the loss of trade, since there was nothing in the language or subject matter of s 209 or Part X of the 1971 Act, which was concerned principally with the stopping up and diversion of highways, to indicate that the Secretary of State was not so entitled and in particular, the statute made no express provision for compensation to those whose rights of unobstructed access to the highway were being extinguished by the order and who thereby suffered a loss of trade and financial loss.

[18] Based on the above authorities, it is very clear to me that the three defendants, had jointly acted unreasonably causing public nuisance especially to the plaintiff, an occupier along the affected public road. Based on the facts before me, the defendants had failed to consider the hardship of a great number of the public road users and occupiers along the public road in favour of a few unlawful traders. The act was intentional and planned. It could not be categorised as accidental. The direct consequence of their intended act had caused great loss to the plaintiff in its supermarket business. None of the defendants could be heard to say that they were not aware of the consequences of the acts on the plaintiff's supermarket business. As statutory authorities and government department they were duty bound to enquire as to how the business of the affected people including the plaintiff would be affected by the closure of the road. No such inquiries had been made by the three defendants. In the light of the above facts and circumstances I ruled that the TOL was unlawfully issued, the road was unlawfully closed and the 76 stalls were invalidly constructed. I also ruled that the defendants had created nuisance to the public including the plaintiff as an occupier of the road.

THE REMAINING DEFENDANTS

[19] It may be pertinent at this juncture for me to refer to the forth till the fourty second defendants. None of them had appeared in court from the very beginning of this case. These people were the hawkers supposedly to have occupied the stalls constructed on Lorong Haji Hussein 3. As I have mentioned earlier, the plaintiff was no longer pursuing the action for demolition of the stalls. The plaintiff's claims had been subsequently amended. At the same time, I was quite convinced that the plaintiff was not really seeking any claim against those hawkers. If they did, I am sure they would have applied for judgment in default against them not only for failure to appear in court but also for failure to file a defence. Since no such request was made by the plaintiff against the 39 hawkers, I decided not to make any order against them. As a matter of fact, the hearing was confined between the plaintiff and the three defendants as mentioned above.

THE CAUSE OF THE COLLAPSE OF PLAINTIFF'S SUPERMARKET BUSINESS

[20] On the basis of the facts and circumstances that had been adduced, I arrived at the conclusion that the collapse of the plaintiff's supermarket business was entirely due to the closure of the public road, Lorong Haji Hussein 3, and the construction of the 76 stalls on it. They had directly caused congestion to the areas at the main entrance to the plaintiff's supermarket. More importantly, vehicles were no longer possible to stop at the entrance for purposes of loading and unloading goods and the car parking bays located at the said road had also been removed. All these had caused great inconvenience to the customers of the plaintiff's supermarket who previously were so used to such luxuries. Without easy access and parking of vehicles, customers would not come to purchase goods at the supermarket. Availability of car parking bays has become a very important factor in any supermarket.

[21] It was contended by the defendants that while admitting that the closure of the road was a factor it was not the only factors that had caused the collapse of the plaintiff's supermarket business. There were other factors as well.

[22] Firstly, the defendants alleged that it was due to the financial crisis that affected Malaysia in the late nineties. Many business ventures had collapsed during that period. I do not agree that the financial crisis was one of the factors. As stated earlier, the products that the plaintiff sold in its supermarket were mainly food stuff and essential household goods. These are daily needs of the ordinary people who must have them even during the time of financial crisis. They are not luxury items. As had also been said the main customers of the plaintiff were its members consisting of over 6000 individual members and 50 cooperative societies and the goods sold at the plaintiff's supermarket were cheap and very competitive. It was proven that the sale of the goods at the plaintiff's supermarket was not at all affected during the 1985 recession. Hence, I am very sure that had the Lorong Haji Hussein 3 not been closed the performance of the plaintiff's supermarket would be the same during the financial crisis period like any other period because it was patronized by its members who still need to purchase their daily needs.

[23] Secondly, the defendants alleged that there was competition from the emergence of several wholesale markets and hypermarkets which provide more facilities and amenities to the customers. Again I do not think that the plaintiffs supermarket performance would in any way be affected. As can be seen from the plaintiff's annual reports that had been produced in court, the reports did mention the existence of supermarkets and hypermarkets and the board of directors of the plaintiff did consider them as competitors. But the bottom line showed the sale and the profits of the plaintiff's supermarket business remained the same. This clearly shows that the regular customers of the plaintiff were not really interested to purchase their daily needs at any other places than the plaintiff's supermarket so long as it was convenient for them to go there and the price was competitive. In the light of the circumstances as stated above, I was of the considered view that the closure of Lorong Haji Hussein 3 was the sole cause of the collapse of the plaintiff's supermarket business. I must add that whilst it is true that there were other places for the plaintiff's customers to park their cars, eg in the same building upstairs at the hotel car parking bays for which parking would be charged and also parking bays further behind the supermarket, these are no longer at par as what the customers had been previously used to enjoy especially the ability to load and unload goods and passengers at the entrance. It is human for people to feel angry and frustrated if a luxury already enjoyed is taken away and given a very poor alternative instead.

THE LOSS SUFFERED BY THE PLAINTIFF

[24] From the time Lorong Haji Hussein 3 was barricaded and closed to all traffic on 28 October 1996 the plaintiff had suffered loss in its supermarket business. The said public road was supposed to be closed for two years. However, it turned out that the closure continued for over five years. Many attempts had been taken by the plaintiff to minimise losses and to continue with the operation of the supermarket. With the drastic reduction in sale, it was very difficult for the plaintiff to make ends

meet. The plaintiff even decided to sell its supermarket in order to get operating expenses from sale money and to rent the same building that had been sold solely for the purpose of sustaining the operation of the supermarket. By the time the Lorong Haji Hussein 3 was reopen five years later, all the customers of the plaintiff had chosen other places to purchase their daily needs with the result that the plaintiff had to abandon its supermarket which otherwise would be doing flourishing business.

[25] In support of claim for losses suffered, the plaintiff called PW4, Mohammad Jamalul Alam @ Jefferey Zain, who is an actuarist. He presented two affidavit statements (exh P23 and P23a). In his statement PW4 explained what: (1) loss of profit; (2) loss of good will or loss in capital value; and (3) loss incurred for restoring its business, and which the plaintiff was entitled to claim. He also produced a report (exh P14) on how estimation of loss in capital value is made and the methodology used. PW4 had been bombardedly cross-examined by the counsels for the defendants especially counsel for defendant No 2 and he had successfully withstood his evidence which I fully accepted.

[26] Apart from the above item of losses the plaintiff also claimed the following:

(i) difference between market value of premises and the sale price; and

(ii) after sale of premises, payment of rent of premises.

[27] The details of all the various claims for losses suffered by the plaintiff are best explained in the written submission by the counsels of the plaintiff which I fully endorsed and adopt.

[28] The defence did not call any witness, let alone expert witness, to rebut the quantum of damages suffered by the plaintiff. I therefore allowed the plaintiff's claims for losses amounting to RM23,743,157 with interest at the rate of 8% per annum as I was fully satisfied that the claims were reasonable and justified. I also ordered costs to be paid to the plaintiff by the defendants.

RECENT JUDGMENT OF THE FEDERAL COURT

[29] It was subsequently brought to my attention by counsel for the second defendant the recent judgment of the Federal Court case of *Majlis Perbandaran Ampang Jaya v Stephen Phoe* [2006] 2 MLJ 389 attempting to persuade this court not to order the second defendant to pay anything to the plaintiff for fear that the second defendant may go bust. In my view, this case can easily be distinguished from the Majlis Perbandaran Ampang Jaya (MPAJ) case where the cause of action was based on negligence. In the instant case, the plaintiff's cause of action was not negligence but nuisance. It originated from the direct wrongful action of the second defendant acting in concert with the first and the third defendants. To allow the second defendant to go unpunished for causing an unlawful act against occupier of a public road thereby causing severe loss to the lawful occupier would result in total chaos in the administration of the local authority. In my judgment earlier, I have ruled that the act of the second defendant in concert with the first and third defendants were unlawful and improper. It had exceeded its power.

[30] In addition to that we cannot equate the financial standing of DBKL to that of MPAJ. The second defendant is a Bandaraya commanding the city of Kuala Lumpur. On my way to Wisma Denmark every morning passing through Jalan Raja Laut, I would see an uncountable number of white four wheel drive vehicles parked around the second defendant's multistorey building, just an indication of the assets owned by DBKL. With respect, the MPAJ's case is no authority whatsoever for the second defendant to seek sympathy from this court having regard to the high handed unlawful acts the second defendant that had caused so much damage to the plaintiff's supermarket business, a lawful business which the second defendant had a moral duty to protect.

Plaintiff's claim allowed with costs.

Reported by Loo Lai Mee